88-183

No._____

Supreme Court, U.S.
FILED
JUL 30 1988
JOSEPH F. SPANIOL, JR.

In The
SUPREME COURT of the UNITED STATES
October Term 1988

SANTOS TORRES, ET AL.,
Petitioners,

vs.

J. F. ENTERPRISES, INC., ET AL.,
Respondents,

_____ and _____

DELTON D. OPFER,
Respondent,

vs.

LORY ARNOLD, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI
To The
OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

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QUESTIONS PRESENTED

Does a State, through its supreme court and general assembly, act without authority and power where its rule, governing practice and procedure, sua sponte, takes away a hearing, having oral argument and the record sent up by the court below, on one of three appeals as of right to the supreme court, where its constitution grants those three appeals as of right, and where the constitution forbids the supreme court to prescribe, and the general assembly to approve, rules which "abridge, enlarge, or modify any substantive right", and where, by plain language, the constitution treats, as equal, the three appeals as of right, particularly where the abridged right involves "cases involving questions arising under the constitution of the United States"?

NOTE: 28 U.S.C. §2403(b) may be applicable.

QUESTION PRESENTED

May a State provide less procedural due process in an appeal as of right to its supreme court, granted to its citizens by the state constitution, than the United States provides in merely a discretionary right of appeal to this Supreme Court, particularly where the state decisions below were grounded in non-federal grounds which were without fair or substantial grounds?

NOTE: 28 U.S.C. §2403(b) may be applicable.

PARTIES

Case No. 1: Torres v. J.F. Enterprises,Inc.

Petitioners:

Santos Torres,

Esther Torres, plaintiffs below

Respondents:

J.F. Enterprises, Inc.,

Robert Richard-officer of corp.,

Kathy Rose, employee,

Greg Shetzer, employee,
defendants below.

Case No. 2: Opfer v. Arnold, Jr.

Petitioner:

Lory Arnold, Jr., defendant
below,

Respondent:

Delton D. Opfer, plaintiff
below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED (2)	i,ii
PARTIES	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	vi
STATEMENT OF CLAIMED JURISDICTION	viii
CONSTITUTIONS, STATUTES, RULES	viii
STATEMENT OF THE CASE	1
SUMMARY OF REASONS FOR GRANTING WRIT	6
ARGUMENT OF REASONS FOR GRANTING WRIT	7
CONCLUSION	19
APPENDIX	
Decisions of Court of Appeals(2)	A1,A34
Decisions of trial courts (2)	A19,A55
Entry of Supreme Court of Ohio Dimissing Petitioners' Appeal As Of Right sua sponte (2)	A30,A62
Notice Of APPEAL to the Supreme Court of the United States (2)	A32,A64

TABLE OF AUTHORITIES

Page

CASES:

Cash v. Cincinnati, 66 Ohio St. 2d 319, 421 NE 2d 1275 (1981)..15,16,17

Kimball v. Cincinnati, 160 Ohio St. 370, 116 NE 2d 708 (1953) . . 16

Wheeling Steel Corp. v. Glander, 337 US 562, 93 L Ed 1544, 69 S Ct 1291 (1949) 8

CONSTITUTIONS:

Constitution of the United States..2,3,4,6 8,12,13,19

Constitution of Ohio. . . . 3,6,7,8,9,12

STATUTES:

Ohio Revised Code §1775.17 18

RULES:

Federal:

Rule 19 of Rules of Supreme Court 7,13

State:

Rule II of Rules of supreme court..4,6,7,9 10,11,13,14,19

OPINIONS BELOW

A. Case No. 1: Santos Torres, et. al., vs. J. F. Enterprises, Inc., et al.

The decision of the Ohio Court of Appeals for the Sixth Appellate District refusing to decide the constitutional question (Case No. WD-87-55), which was rendered on March 31,1988, is unreported, and is reproduced in the appendix (A1-A18).

The decision of the Wood County, Ohio, Court of Cmmon Pleas granting summary judgment to defendants (respondents herein) (Case No. 86-CIV-255) which was rendered on July 21, 1987, is unreported, and is reproduced in the appendix (A19-A29).

The Entry of the Supreme Court of Ohio dismissing petitioners' appeal as of right sua sponte (Case No. 88-669), which was rendered on May 25, 1988, is unreported, and is reproduced in the appendix (A30-A31).

B. Case No. 2: Delton D. Opfer vs. Lory Arnold, Jr.

The decision of the Ohio Court of

Appeals for the Sixth Appellate District affirming the trial court, which was rendered on March 11, 1988 (Case No. L-87-159) is unreported, and is reproduced in the appendix (A34-A54).

The decision of the Lucas County, Ohio, Court of Common Pleas granting judgment to plaintiff (respondent herein) (Case No. 86-1918), is unreported, and is reproduced in the appendix (A55-A61).

The Entry of the Supreme Court of Ohio dismissing petitioner's appeal as of right sua sponte (Case No. 88-668) which was rendered on May 25, 1988, is unreported, and is reproduced in the appendix (A62-A63).

STATEMENT OF CLAIMED JURISDICTION

The Entry of the Supreme Court of Ohio, in both cases sub judice, was entered on May 25, 1988. Jurisdiction is alleged pursuant to 28 U.S.C. §1257(3) and the Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONS, STATUTES, RULES INVOLVED

(a) Both cases sub judice involve the Fourteenth Amendment to the Constitution of the United States, in pertinent part states:

"[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(b) The Constitution of Ohio is involved, and in pertinent parts states:

Art IV, §2(A)(2):

"The supreme court shall have appellate jurisdiction as follows:

"(a) In appeals from the courts of appeals

as a matter of right in the following:

"(i)Cases originating in the courts of appeals;

"(ii)Cases in which the death penalty has been affirmed;

"(iii)Cases involving questions arising under the constitution of the United States or of this state."

Art IV, §5(B) of Constitution of Ohio:

"The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right."

Both cases sub judice also involve Rule II of Ohio's Rules of Practice for its supreme court, Sections 3 and 9, stating:

"Section 3. Consideration as to Existence of Constitutional Question

"(B) Where appellant claims that he has an appeal as of right (i.e., that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time that it considers any motion to certify or motion for leave to appeal in the case."

"Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed

"Except in those cases originating in

> the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C. 2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify the record has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule."

Lastly, Rule 19 of This Court's Rules of Practice is involved in order to show a comparison of procedural due process in the state supreme court and the Supreme Court of the United States,stating in pertinent part:

> ".1. A party intending to file a petition for certiorari, prior to filing the case in this Court or at any time prior to action by this Court on the petition, may request the clerk of the court possessed of the record to certify it, or any part of it***to this Court***."

No. _____

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SANTOS TORRES, ET AL.,
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_____ and _____

DELTON D. OPFER,
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PETITION FOR WRIT OF CERTIORARI
To The
OHIO COURT OF APPEALS
FOR THE SIXTH APPELLATE DISTRICT

STATEMENT OF THE CASES

Petitioners Santos Torres and Esther Torres filed the following constitutional question in the Sixth District Court of Appeals, following a summary judgment granted to respondents by the trial court:

> "4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights." (Decision, A4.)

Petitioners first learned of the trial judge's alleged "bias against Mexicans" twenty days after the trial judge granted summary judgment against them. Under Ohio Rules of Court, "a motion for a new trial shall be served not later than fourteen days after the entry of judgment."

The Court of Appeals refused to decide petitioners' due process question against the trial judge, citing and quoting from a decision of the Ohio Supreme Court:

> "[T]he Court of Appeals [is] without authority to ...void the judgment of the trial court upon that basis." (Decision, A7.)

Petitioners then timely presented their Fourteenth Amendment question to the Supreme Court of Ohio, in this manner:

"III. SUBSTANTIAL CONSTITUTIONAL QUESTION

"(A) The trial judge had a personal bias and prejudice against the two Hispanic plaintiffs that prevented the trial judge from exercising his judicial functions impartially, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights." (Emphasis in original.)

In its Entry, dated May 25, 1988, the Supreme Court of Ohio treated petitioners' appeal,as of right to that court,in this way:

> "Upon consideration of the motion for an order directing the Court of Appeals for Wood County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein." (Entry, A30.)

No Ohio court had decided petitioners' constitutional question, arising under the constitution of the United States, despite Ohio citizens' substantive right to appeal, as of right, to their supreme court from the court of appeals, granted to them by the Constitution of Ohio, Art.IV §2(B)(2)(a)(iii). Petitioners Santos Torres and

Esther Torres appealed to this Court May 31, 1988, challenging Ohio's Rule II.

In the second case sub judice, petitioner Lory Arnold, Jr., had an identical experience with Ohio's Rule II and its prejudicial effect upon his appeal as of right to the Supreme Court of Ohio from the same Court of Appeals.

Following a bench trial in which his attorney made objection, defendant Arnold had his attorney file the following constitutional question to said Court of Appeals:

> "Second Assignment Of Error: A state official, the trial court judge, had a personal bias or prejudice for plaintiff to the extent it prevented him from exercising his judicial functions impartially in defendant's case, in direct violation of defendant's Fourteenth Amendment Due Process rights." (Emphasis in original, see Decision of Court of Appeals, A42.)

Defendant (petitioner herein) Arnold's attorney pointed out three specific parts of the bench trial in which the trial judge displayed a prejudicial "adversarial role"

that favored the plaintiff in the case: (1) trial judge did not allow defendant Arnold to explain his answer upon request of defendant, (2) trial judge attempted to intimidate defendant by asking irrelevant questions about defendant's wife who was neither a party nor a witness to the proceeding, and (3) trial judge did not acknowledge or rule on defendant's objection to plaintiff's counsel asking more than one question within one question, yet the trial judge continually sustained plaintiff's same objections against defendant's counsel. The Court addressed not one.

Instead, the Court of Appeals "not[ed]" *** the trial judge did intervene during the questioning of certain witnesses [but] is neither prejudicial or biased behavior***."

Petitioner Arnold then timely presented his Fourteenth Amendment question to the Supreme Court of Ohio, in this manner:

"III. SUBSTANTIAL CONSTITUTIONAL QUESTION
"A. In Trial Court:
"Judge Charles Abood, during a bench

trial, violated defendant's Fourteenth Amendment Due Process rights to a fair and impartial hearing." (Emphasis in original.)

In its Entry, dated May 25, 1988, the Supreme Court of Ohio treated petitioner's appeal, as of right to that court from the court of appeals, in this way:

"Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein." (Entry, A62.)

Petitioner Lory Arnold, Jr., appealed to this Court May 31, 1988, challenging Ohio Rule II on constitutional grounds.

SUMMARY OF REASONS FOR GRANTING WRIT

The importance of these cases goes far beyond the parties themselves. Ohio's Rule II, Sections 3 and 9, appears to abridge a substantive right given to Ohio citizens by the Ohio Constitution itself, i.e., the appeal as of right from the court of appeals

to the Supreme Court of Ohio in "cases involving questions arising under the constitution of the United States", Art.IV §2(B)(2)(a)(iii). The other two appeals as of right, granted by the state constitution, are not affected or abridged at all by Rule II, as seen from the language of the Rule itself.

Further, Ohio's Rule II provides less procedural due process than Rule 19 of this Court, even though Rule II affects an appeal as of right, whereas Rule 19 affects discretionary appeals. A uniform and just system of federal law and federal review appears to require this Court's intervention.

Lastly, time will not further illuminate or diminish the constitutional issues in dispute, as Sections 3 and 9 of Rule II have been a part of established state practice since 1979.

ARGUMENT

RULE II ABRIDGES SUBSTANTIVE RIGHT

The state action, which is reviewable under the Fourteenth Amendment, is the composite result of both legislation and its judicial interpretation, Wheeling Steel Corp. v. Glander, 337 U.S. 562 (1949).

In the first case sub judice, petitioners Santos Torres and Esther Torres never had their Fourteenth Amendment due prosess question decided by any Ohio court, yet the Constitution of Ohio grants all of its citzens, of whom Santos and Esther are two, an appeal as of right from the court of appeals to the supreme court, Art. IV §2(B)(2)(a), and grants two other equal appeals as of right:

> "(2) The supreme court shall have appellate jurisdiction as follows:
> "(a) In appeals from the court of appeals as a matter of right in the following:
> "(i) Cases originating in the court of appeals;
> "(ii) Cases in which the death penalty has been affirmed;
> "(iii) Cases involving questions arising under the constitution of the United States or of this state."

At the same time, the state constitution limits the rule-making authority and power of the supreme court to prescribe, and the general assembly to approve, rules governing practice and procedure:

> "IV §5(B) The supreme court shall prescribe rules governing practice and procedure in all courts of this state, which rules shall not abridge, enlarge, or modify any substantive right. ***
>
> "Proposed rules shall be filed by the court...with the clerk of each house of the general assembly [and] shall take effect...unless prior to such day the general assembly adopts a concurrent resolution of disapproval."

Notwithstanding Art. IV §5(B), the supreme court prescribed, and the general assembly did not disapprove, Rule II of its practice and procedure which states in Section 3 and Section 9:

> "Section 3. Consideration as to Existtence of Constitutional Question
>
> "(B) Where appellant claims that he has an appeal as of right (i.e.,that the case involves a constitutional question), the Supreme Court will, sua sponte, consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question and will consider such motion to dismiss at the same time

that it considers any motion to certify or motion for leave to appeal in the case." (Parentheses in original.)

"Section 9. Record Not to Be Sent to Supreme Court Until Appeal Allowed

"Except in those cases originating in the Court of Appeals, and in those cases in which the death penalty has been affirmed, unless otherwise ordered and notwithstanding R.C.2505.08, neither the original papers nor the transcript of proceedings shall be transmitted to the Supreme Court, unless and until a motion to certify has been granted or a motion for leave to appeal has been granted or, in the case of an appeal as of right, unless and until the court has overruled the motion to dismiss referred to in Section 3 of this rule.

"(Amended, eff 3-1-79)".

When Santos and Esther Torres, in the first case, and Lory Arnold, Jr., in the second case, attempted to timely exercise their appeals as of right from the court of appeals to the supreme court, the Supreme Court of Ohio, in separate Entries dated May 25, 1988, and pursuant to Rule II, gave both sets of petitioners only a "consideration" hearing to determine whether or not a "substantial constitutional question"

existed, and,sua sponte, treated their appeal as of right as upon a motion to dismiss, without giving either set of petitioners a hearing equivalent to the hearing the supreme court gives to the other appeals as of right, i.e, no hearing on the merits with oral argument and no record sent up by the court below before the "determination" hearing, prohibited by the rule.

Petitioners Santos and Esther Torres, and petitioner Lory Arnold, Jr., challenge Section 3 ("consideration" hearing sua sponte) and Section 9 ("Record Not to Be Sent To Supreme Court Until Appeal Allowed) as unconsitutionally abridging their substantive right granted to them under the Constitution of Ohio, i.e., the right of an appeal as of right from the court of appeals to the supreme court in "[c]ases involving questions arising under the constitution of the United States."

Petitioners do not believe that the plain language of their state constitution

permits anything but equal treatment by the State of Ohio on all three appeals as of right, i.e., the same type of hearing in all three types of appeal as of right.

Where, in the Ohio Constitution, do its framers or amenders intimate, let alone state, that an appeal as of right, on "questions arising under the constitution of the United States", should be treated with less procedural due process than an appeal as of right in "[c]ases originating in the court of appeals"?

Where, in the Ohio Constitution, do its framers or amenders state, or even intimate, that an appeal as of right in "[c]ases involving questions arising under the constitution of the United States" should be treated with less procedural due process than "[c]ases in which the death penalty has been affirmed"?

Where, petitioners ask, does the state supreme court and general assembly find

the authority and power to whittle down their citizens' appeal as of right on "questions arising under the constitution of the United States" to a much smaller class of questions which they, under Rule II, now call "substantial constitutional question[s]" arising under the constitution of the United States?

Rule II, Sections 3 and 9, severely impinges upon Ohio citizens' appeal as of right to the supreme court in "[c]ases involving questions arising under the constitution of the United States".

RULE II, WHICH AFFECTS AN APPEAL AS OF RIGHT, PROVIDES LESS PROCEDURAL DUE PROCESS THAN RULE 19 OF THIS COURT, WHICH AFFECTS A LESS VALUABLE APPEAL, A DISCRETIONARY APPEAL

In their second federal question, petitioners in both cases, sub judice, ask:

> "May a State provide less procedural due process in an appeal as of right*** than the United States provides in merely a discretionary right of appeal [Rule 19], particularly where the state decisions below were grounded in non-federal grounds which were without

fair or substantial grounds?"

Rule II affects an appeal as of right to a state supreme court. Rule 19 of this Court affects a discretionary right of appeal to the Supreme Court of the United States. Yet the discretionary appeal to this Court permits the full record to be sent to this Court prior to its action on the discretionary appeal. Rule II does not.

Petitioners, in both cases, challenge Rule II, Sections 3 and 9, on due process grounds, in addition to unconstitutionally abridging their appeal as of right.

In both cases sub judice, the state decisions below, both, the trial court and the court of appeals in each case, show on the face of each decision that each was grounded in non-adequate state grounds.

In the Torres case, the facts, as found by the trial judge, when viewed in light of the latest applicable law cited

by the court itself, clearly show that the trial judge granted summary judgment against Santos and Esther Torres without a sufficient evidentiary basis. The trial judge found, by the defendants' (respondents herein) own testimony, not petitioners', that the hole that Santos Torres "stepped into", breaking his leg, at defendant's self-serve gas station was "1½ inches" deep and "two feet square" (Decision A23, A24), and that defendants had notice, the month before the accident, that "there existed another defect in the pavement around the northern pumps island...approximately fifteeen feet long and of unknown depth where the pavement had settled" (Decision A23).

The trial court cited seven defective-public-sidewalk-private-pavement cases for support (A24), latest of which was Cash v. Cincinnati, 66 Ohio St. 2d 319, 421 NE 2d 1275 (1981), whose syllabus stated:

"1. Reasonable minds could differ as to whether a 12 to 14 inch wide, one and one-half inch deep, excavation excavation extending into the width of a crosswalk in a heavily traveled downtown section of the city was so substantial that such defect rendered the crosswalk unsafe for travel in the usual and ordinary mode. (Kimball v. Cincinnati, 160 Ohio St. 370, distinguished.)

"In such a case when reasonable minds might differ as to whether a defect in a crosswalk is so trivial as to relieve liability, a trial court properly leaves that issue to the jury, and all the attendant circumstances must be considered in determining whether such a crosswalk is reasonably safe for use by pedestrians."

The hole in Cash, in its syllabus, that the Supreme Court ruled should be sent to the jury was "one and one-half inch deep" by "12 to 14 inch wide".

The hole that Santos Torres stepped into was the same depth, "1½ inches" deep by "two feet square" (Decision, A23, A24), slightly larger than in Cash. Yet the trial judge granted summary judgment to respondents, after citing Cash, and after Cash, in its syllabus, distinguished Kimball v. Cincinnati and its "two inch" doctrine.

And the deposition of Santos Torres showed the "attendant circumstance" of obscured vision that was present in Cash:

> "Mr. Torres on cross by [D's attorney]":
>
> "Q All right. You open the door, you go to get out, and you step down from the van, and it's as you step down, you hit this depression, and hear or you feel something break?
>
> "A I open the door, but I couldn't see nothing, because that thing is right along the edge. I couldn't see if, if there was a hole or what, because--
>
> "Q You didn't look?
>
> "A Which--
> "Q You didn't look when you stepped down?
> "A I looked, but I didn't see the edge of it, and that's what cracked me, not because I put the weight on where the hole was." (Dep., 24,25.)

Accordingly, genuine issues of fact existed and summary judgment against Santos and Esther Torres was improper.

In the second case sub judice, fewer words, from the trial court's decision, are needed to show that a substantial part of the judgment against petitioner Lory Arnold, Jr., was improper and grounded in a non-adequate, non-federal basis.

The trial court's findings of fact were left undisturbed by the court of appeals, and only two are needed to show that substantial justice was not done:

> "1. In April of 1984, the parties entered into a[50/50] partnership agreement.
>
> "4. Under the agreement, [respondent] was to pay an additional amount to obtain a 50% interest in the tools. [Respondent] did not make this payment;" (Decision, A58, A59.)

The Court of Appeals cited this section of the controlling law in Ohio, Ohio Uniform Partnership Act, §1775.17:

> "1775.17 Rules for determining rights and duties of partners
>
> "(A) Each partner shall be repaid his contribution, whether by way of capital or advances, to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; ***"
> (Decision, A49

Yet the trial judge granted judgment to respondent, but did not require respondent to make the substantial "payment" to "obtain a 50% interest in the tools" which the partnership used for approximately two

years, and without said tools, no profits would have been possible to be split and awarded to respondent in the form of a judgment. Testimony at the bench trial showed that the tools were worth several thousands of dollars, and the uncontroverted testimony of petitioner Arnold was that the "use" of the tools to the partnership was worth "$6,000.00", elicited by the trial judge himself on direct interrogation of petitioner on the stand.

Accordingly, not one of the two cases, sub judice, was grounded in adequate non-federal grounds.

CONCLUSION:

For the reasons stated above, petitioners in both cases submit that this single appeal brings before this Court constitutional questions on Rule II that are important to all Ohio citizens, and which require plenary consideration, with briefs

on the merits and oral argument, for their resolution.

Respectively submitted,

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APPENDIX

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
MAR 31 1988
Clerk
Rebecca E. Bhaer

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF WOOD

C. A. NO. WD-87-55

Santos Torres and Esther Torres
APPELLANTS

-VS-

J. F. Enterprises, Inc., et al.
APPELLEES

APPEAL FROM WOOD COUNTY COMMOM PLEAS COURT

NO. 86-CIV-255

DATE March 31, 1988

DECISION AND JOURNAL ENTRY

This cause is on appeal from a judgment of the Wood County Court of Common Pleas.

The events which gave rise to this action are essentially uncontroverted. On September 6, 1985, at approximately 6:00 a.m., plaintiff-appellant,

Santos Torres, drove his van to a gas station owned by defendant-appellee J. F. Enterprises, Inc. Santos Torres was accompanied by his wife Esther Torres who joins him in this appeal.

Upon arriving at the gas station, appellants parked their van near the northwest set of gasoline pumps. As he was exiting his van, Mr. Torres stepped onto what has been described in varying ways by the parties as an "elongated hole," a "crack" and a "depression." Appellant's right foot stepped on the edge of this depressed area as he decended from his van. In exiting the van, appellant fell, injuring his right foot and knee. Appellant Esther Torres witnessed the incident and reported it to defendant-appellees Greg Shetzer and Kathy Rose, employees working at the station. Appellees Shetzer and Rose were approximately forty feet away from the

van and did not observe appellant's fall.

In their original cause of action, appellants alleged that appellee J. F. Enterprises, Inc., negligently maintained the area around the gas pumps so as to cause injury to the appellant.

On June 8, 1987, appellee J. F. Enterprises, Inc., moved for summary judgment as to any issue regarding negligence. In support of the motion for summary judgment appellee alleged that because appellants were business invitees the standard of care owed them is one of ordinary care to prevent reasonably foreseeable accidents and injuries. S.S. Kresge Co. v. Fader (1927), 116 Ohio St. 718. Appellees also urged that they did not have a sufficient period of notice to either correct the depression or warn of its presence. S.S. Kresge Co., supra. The court granted summary judgment in favor of appellees.

From said judgment, appellants set out the following four assignments of error:

> "1. Trial court erred in granting the motion of defendants for summary judgment for the reason that its judgment is contrary to law.
>
> "2. The trial court erred in granting the motion of defendants for summary judgment for the reason that the trial judge violated Ohio Rule of Evidence 602 [Lack Of Personal Knowledge], to the prejudice of plaintiffs.
>
> "3. The trial court unconstitutionally applied Ohio Rule of Evidence 407 [Subsequent Remedial Measures] to the prejudice of plaintiffs.
>
> "4. The trial court judge had a personal bias and prejudice against the two Hispanic plaintiffs to the extent that it prevented the trial judge from exercising his judicial functions impartially in plaintiffs' case, in direct violation of plaintiffs' Fourteenth Amendment Due Process and Equal Protection rights."

In their first assignment of error, appellants contend that in granting summary judgment, the trial court's

decision was contrary to law as announced by the Ohio Supreme Court in Cash v. Cincinnati (1988), 66 Ohio St. 2d 319, and Helms v. American Legion, Inc. (1966), 5 Ohio St. 2d 60.

In Cash, the court held that it was for the jury to determine whether the defendant was negligent in allowing a depression in a crosswalk approximately twelve to fourteen inches wide and one and one-half inches deep to remain unrepaired. However, the court clearly differentiated its holding in Cash from other similar cases. In Cash, the court noted, circumstances surrounding the depression existed that did not render such a "defect insubstantial as a matter of law." Such circumstances in Cash included a busy downtown intersection, poor visibility and surrounding vehicular traffic. None of the distractions referred to in Cash are present in this case. Appellants do

not allege poor visibility or obstructed vision.

Appellants would have the court focus much of its attention on the size of the depression. Appellants contend that because the overall dimensions of the depression were larger than Cash that its potential for peril was an issue for the jury. Much of this argument is misplaced. The overall dimensions of the depression are relatively unimportant because appellant's fall occurred as he attempted to place his weight on the edge of the depression. This indicated that the focus should be on the disparity in elevation rather than expanse of the depression.

Appellants provide no evidence as to the depth of the depression. Conversely, appellees present two affidavits indcating the depth to be anywhere from "less than one inch" (affidavit of Robert Richard) to "one and one-half inches"

(answer of Greg Shetzer). Construing the evidence most strongly in favor of appellants (Civ. R. 56(C)), a depression with a depth of one and one-half inches is not so dangerous as to create a question for the jury as a mater of law. Kimball v. Cincinnati (1953), 160 Ohio St. 370. In what has been referred to as the "two-inch doctrine," see Gallagher v. Toledo (1959), 168 Ohio St. 508; Buckley v. Portsmouth (1959), 168 Ohio St. 513; Kindle v. Arkon (1959), 169 Ohio St. 373, the Kimball court held that a "slight defect" did not create a question of fact for the jury as a matter of law. The holding in Kimball was extended to owners and occupiers of private premises in Helms v. American Legion, Inc., supra.

Appellants assert that the trial court "usurped the power of the Supreme Court" in applying Helms to the case sub judice. Appellants argue that the trial court abused its discretion by

failing to consider all attendant circumstances before granting appellees' summary judgment motion. This argument is also without merit.

> "The trial court's judgment [will not] be disturbed on appeal absent a showing that the trial court abused its discretion (citations omitted). *** The term 'abuse of discretion' connotes more than an error or law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." Blakemore v. Blakemore (1983), 5 Ohio St. 3d 217 (citations omitted).

As observed by the trial court, appellants failed to personally obtain the measurement of the depression, choosing instead to rely on appellees' affidavits. Appellants also failed to present evidence of unique circumstances to distinguish their cause of action from Helms and make summary judgment an inappropriate disposition. Therefore, the trial court's attention was properly directed to the difference in elevation noted in each case and their adherence

to Kimball, making each cited case applicable to the case sub judice.

Summary judgment is properly "granted when it appears from the evidence submitted that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made ***." Adkins v. Ontario (1983), 8 Ohio St. 3d 45. Appellants have failed to adduce, nor will they be able to do do, enough evidence to address these issues at trial.

For all of the aforestated reasons, appeallants' first assignment of error is found not well-taken.

Appellants' second assignment of error concerns the trial court's application of Ohio Evid. R. 602. Evid. R. 602 provides in part that:

> "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evi-

> dence to prove personal knowledge may, but need not, consist of the testimony of the witness himself."

Appellants claim that appellee Robert Richard did not know where the incident took place and, therefore, did not have the requiste personal knowledge necessary for acceptable testimony regarding size and depth of the depression.

In his affidavit Richard stated that he learned of the location of the depression from appellee Kathy Rose. According to the testimony of Mrs. Torres, Rose was advised as to the location of the incident immediately after it happened. Accordingly, Rose acquired personal knowledge as to where the incident occurred. Rose subsequently and without any indication of uncertainty or hesitation, led Richard to the site, thereby allowing him to obtain personal knowledge regarding the location of the depression.

Accordingly, the trial court

did not err in its application of Ohio Evid. R. 602. The affidavit of Robert Richard was properly admitted as evidence of the depth of the depression.

For the aforestated reason, appellants contend that the trial court misapplied Ohio Evid. R. 407 to the prejudice of the appellants. Evid. R. 407 provides:

> "When, after an event, measures are taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose ***."

Appellants contend that because appellees made repairs to the area in question a short time after the incident, appellants were prevented from measuring the depression. Noting that summary judgment was granted in part on the basis of the trial court's conclusion that ap-

pellants failed to obtain their own measurement, nor would they be able to because of subsequent repairs to the area, appellants assert that Evid. R. 407 was violated. Appellants argue that in considering the repairs, the trial court breached Evid. R. 407. Appellants' claim is unfounded.

In addition to the fact that no reference to Evid. R. 407 is made in the decision below, the second sentence of Evid. R. 407 "does not require the exclusion of evidence of subsequent measures when [the evidence is] offered for another purpose ***." In this case, the "other purpose" was to establish that appellants would be precluded from gathering further evidence at the site of the incident. There is nothing in the record to indicate that inclusion for this purpose was improper or prejudicial to appellants.

Appellants also dwell on the

trial court's alleged failure to provide additional time for them to personally ascertain the dimensions of the hole. This claim is also contrary to evidence and without merit.

During the time between when appellants were made aware of the identity of the contractor conducting the repairs to appellees' premises and the day the motion for summary judgment was filed, appellants made no attempt to depose the contractor regarding the size of the hole. Appellants' failure to obtain timely the eyewitness testimony of the contractor considered in addition to the repairs, made it proper for the trial court to conclude that appellants would fail to produce additional evidence regarding the dimensions of the hole at trial. Therefore, it was proper for the trial court to rely solely on the statements of appellees Robert Richard and

Greg Shetzer concerning the size of the depression.

A party opposing a motion for summary judgment,

> "[M]ust establish, by specific facts, that there is a genuine issue for trial in order to avoid summary judgment (citation omitted). Unsupported allegations in opposition to a motion for summary judgment are insufficient to require denial of the motion." Albritton v. Neighborhood Centers Assn. (1984), 12 Ohio St. 3d 210 (citations omitted).

For all of the aforestated reasons, appellants' third assignment of error is not well-taken.

In their fourth assignment of error, appellants contend that the trial judge had a personal bias against the Hispanic heritage of appellants so as to deprive them of their constitutional rights of Due Process and Equal Protection.

It is unnecessary to reach this

assignment of error as presented by appellants. Assuming appellants are suggesting the trial judge should have removed himself from the instant case, appropriate procedure dictates that:

> "[a]uthority to pass upon the disqualification of a judge of the Court of Common Pleas is vested in the [Ohio] Chief Justice under section 5(C) of Article IV of the Ohio Constitution ***." Beer v. Griffith (1978), 54 Ohio St. 2d 440.

The proper disqualification procedure is enumerated in R.C. 2701.03. This section requires an affidavit be filed "setting forth the fact of the interest, bias, prejudice, or disqualification." The affidavit must be filed "not less than three days prior to the time set for the hearing in the matter or cause." R.C. 2701.03.

> "Since only the Chief Justice or his designee may hear disqualification matters, the Court of Appeals [is] without authority to pass upon the dis-

> qualification or to void the judgment of the trial court upon that basis." Beer, Supra.

Therefore, in light of R.C. 2701.03, we need not decide the constitutional issues raised by appellants. Courts will avoid constitutional questions when nonconstitutional rulings are dispositive. Greenhills Home Owners Corp. v. Village of Greenhills (1966), 5 Ohio St. 2d 207, paragraph one of the syllabus.

For the aforestated reason, appellants' fourth assignment of error is not well-taken.

More than a mere cautionary statement, however, is directed to appellants. It should be noted that "there is a presumption of the trial judge's impartiality," State v. Browning (1967), 9 Ohio Misc. 228, which must be overcome by the party requesting disqualification.

> "In the absence of some showing to the contrary, there is a presumption that the trial

> judge performed his duty and did not rely upon anything in reaching his decision that he should not have relied upon." City of Columbus v. Guthmann (1963), 175 Ohio St. 282.

Additionally,

> "it is well-recognized in trial court circles that the mere filing of an affidavit often intensifies the feeling of the judge against the person who originates it. Such a charge is not complimentary, is felt by the recipient to be derogatory and generlly reflects on the strength of the character of the trial judge." State v. Browning, supra.

A review of the record fails to reveal any indication of partiality and prejudice on the part of the trial judge. Such suggestions and allegations by counsel should only be set forth where a reasonable and well-founded basis for such serious accusations is present.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Wood County of Common Pleas

is affirmed. Appellants are ordered to pay the court cost of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

John J. Connors, Jr., J. s/s
JUDGE

Peter M. Handwork, J. s/s
JUDGE

George M. Glasser, J. s/s
CONCUR. JUDGE

1987 JUL 21 AM 9:44

BETTY J. HAAS
CLERK

IN THE COURT OF COMMON PLEAS OF
WOOD COUNTY, OHIO

Santos Torres, et al. Plaintiffs, vs. J. F. Enterprises, Inc., et al. Defendants.	Case No. 86-CIV-255 ORDER AND JUDGMENT ENTRY GRANTING MOTION

This cause came before this Court on the motion of the defendants requesting summary judgment against plaintiffs' on their complaint.

Oral arguments having been waived or found unnecessary, the Court reviewed all pleadings, affidavits and memoranda which have been filed in this cause.

The Court on due consideration finds the motion well taken and that it should be granted for the reasons set forth in the Memorandum Decision attached.

IT IS THEREFORE ORDERED that defendants' motion for summary judgment is granted. This case is therefore dismissed with prejudice at the plaintiffs' costs.

s/s
Judge Gale Williamson

xc: Walton H. Donnell
Joseph P. Dawson

1987 JUL 21 AM 9:44
BETTY J. HAAS
CLERK

IN THE COURT OF COMMON PLEAS OF
WOOD COUNTY

Santos Torres, et al.
Plaintiffs,

vs.

J. F. Enterprises, Inc., et al.
Defendants.

Case No. 86-CIV-255

MEMORANDUM DECISION

This cause is before this Court on the motion for summary judgment filed by defendants pursuant to Rule 56 of the Ohio Rules of Civil Procedure. Defendants move for summary judgment in their favor and against plaintiffs on the personal injury claim of Santos Torres and the loss of consortium and infliction of emotional distress claims of his wife, Esther Torress. The Court has before it the pleadings of the parties, defendants' memorandum in support of its motion (to which is attached the affidavit of

Robert Richard, President of J. F. Enterprise, Inc.), and plaintiff's motion to deny defendants' motion with supporting memorandum (to which are attached the affidavits of Santos and Esther Torres).

FACTS

On September 6, 1985, plaintiff Santos Torres, drove his van to the gas station owned by defendant J. F. Enterprises, Inc. As he exited the van to operate defendants' self-service gas pumps, Mr. Torres stepped into what he describes as an elongated hole in the surface of the pump area and triped injuring his right foot and knee. Employees of the station, defendants Greg Shetzer and Kathy Rose, situated approximately forty feet away did not observe Mr. Torres stepping in the hole but Mrs. Torres reported the incident to defendants Shetzer and Rose. Mr. Torres asserts the injury occurred at an island

on the north side of the premises.

On September 9, an employee of the station showed Mr. Richard a depression in the pavement where the pump island met the surrounding paved surface. The employee believed that this was where Mr. Torres had tripped. Mr. Richard observed that the depression was approximately two feet square and less than one inch deep.

In August of 1985, there existed another defect in the pavement around the northern pumps island. This consisted of crack approximately fifteen feet long and of unknown depth where the pavement had settled. In August the contractor agreed to repair this crack and a repavement of the pump area was finished sometime in September of 1985. Mr. Torres is unable to give a size description of the hole where he was injured and has returned to the site of

the injury only to find that the entire area is smooth, without depressions of any kind. The defendant, Gregory Shetzer examined the crack and found there to be an elevation difference of about 1 1/2 inches at the crack.

DISCUSSION

Defendants have moved for summary judgment in their favor as a matter of law relying upon the so-called "two-inch doctrine" set forth in Kimball v. Cincinnati (1953), 160 Ohio St. 370, and its progeny. According to this doctrine, a hole or unevenness in the surface of an area traversed by pedestrians which is less than two inches in depth, may be found, in light of the attending circumstances, to be a "minor" or "trivial" imperfection in the surface such that the owner thereof is not liable to those injured by the condition as a matter of law. See Kimball v. Cincinnati, supra;

Gallagher v. Toledo (1959), 168 Ohio St. 508; Buckley v. Portsmouth (1959), 168 Ohio St. 513; Amos v. Cleveland Heights (1959),169 Ohio St. 367; Kindle v. Akron (1959), 169 Ohio St. 373; Helms v. American Legion, Inc. (1966), 5 Ohio St. 2d 60; Cash v. Cincinnati (1981), 66 Ohio St. 2d 319. Although, as admitted by defendants in their motion, there does not appear to be any reported Ohio decisions dealing wiht imperfections in filling station driverways or other areas traversed by both pedestrians and motorists, the basic rationale of the Kimball decision seems applicable to the case at bar. Owners of premises commonly traveled by members of the public are not insurers against injury caused by minor imperfections in the surface area which are commonly encountered and to be expected by the traveler. Helms, supra, syllabus. Whether Mr. Torres was a

"pedestrian" or a "motorist" when he was injured as he stepped from a motor vehicle is not determinative in applying the two-inch doctrine to the circumstances of this case.

Before the Court may render summary judgment pursuant to Rule 56 of the Ohio Rules of Civil Procedure, the defendants must show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When a defendant's motion for summary judgment alleges that the facts will not support a legal basis for liability even if proven, a summary judgment may be considered. A summary judgment is similar to a dismissal for failure to state a claim for which relief can be granted. Kwait v. John David Managment Co. (1974), 42 Ohio App. 2d 63, 329 N.E. 2d 702, paragraph three of the syllabus. Plaintiffs, in their opposing

motion, assert that genuine fact issues exist concerning the size and location of the hole where Mr. Torres was injured. However, plaintiffs have plainly demonstrated, first in their complaint and again in their supporting affidavits, that they will be unable to adduce evidence addressing these issues at trial because plaintiffs either failed to observe or obtain measurement of the hole's dimensions. At trial the plaintiffs will not be able to more than reiterate the unsupported allegations of their complaint in response to Mr. Richard's or Mr. Shetzer's testimony regarding the depth of the hole. Although unsupported allegations in the pleadings is not a sufficient ground for granting summary judgment, the basic role of summary judgment is "to move beyond allegations in pleadings, and to analyze the evidence so as to ascertain whether an act-

ual need for a trial exists." Harless v. Willis Day Warehousing Co. (1978), 54 Ohio St. 2d 64, 66. Applying this principle to the case sub judice, defendants' motion for summary judgment must be granted if it is apparent that plaintiffs will not be able to establish that the hole was of sufficient dimension to create a breach of the defendants duty to protect members of the public from unreasonable risks. Construing the evidence before the Court most strongly in the plaintiffs' favor, it appears inevitable that plaintiffs will not be able to establish a prima facie case of negligence in the absence of any proof whatsoever concerning the size of the hole where plaintiff was injured. The evidentiary presumption of res ipsa loquitur is unavailable in the plaintiffs case in the absence of evidence tending to show that Mr. Torres' injuries would ordinar-

ily have occurred only by a breach of defendants duty of care. Morgan v. Childrens' Hosp. (1985), 18 Ohio St. 3d 185. For this reason, defendants' motion for summary judgemnt in their favor must be granted on Mr. Torres' negligence claim. Also, because Mrs. Torres' claims are derivative to Mr. Torres' negligence cause of action, summary judgment must be granted in favor of defendants on the loss of consortium and infliction of emotional distress claims as well.

s/s
Judge Gale Willimson

xc: Walton H. Donnell
Joseph P. Dawson

The Supreme Court of Ohio

Columbus

Santos Torres et al., Appellants,	:	1988 TERM
v.	:	To wit: May 25, 1988
J. F. Enterprises, Inc., Appellee.	:	Case No. 88-669

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Wood County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Walter (sic) H. Donnell.

s/s
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL CLERK

s/s DEPUTY

FILED
WOOD COUNTY, OHIO
COURT OF APPEALS
MAY 31 1988
Rebecca E. Bhaer Clerk

IN THE COURT OF APPEALS OF
WOOD COUNTY, OHIO

Santos Torres, et al., Plaintiffs-Appellants,	:	CASE NO-WD-87-55
- vs -	:	TRIAL COURT NO.-86-CIV-255
J. F. Enterprises, Inc., Defendant-Appellee.	:	NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Santos Torres and Esther Torres, appellants in the above-named action, appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of Wood County, Ohio, Sixth District, dated March 31, 1988, which judgment was denied review by the

the Supreme Court of Ohio in an Entry dated May 25, 1988, dismissing appellants' appeal to the state's highest court.

The record is in this Court of Appeals whose judgment of March 31, 1988 affirmed the judgment of the trial court, the Common Pleas Court of Wood County, Ohio, dated July 21, 1987.

Pursuant to Title 28 USC §1257(2).

s/s
Walton H. Donnell
ATTORNEY FOR APPELLANTS
742 Otsego Pike, P.O. Box 733
Bowling Green, OH 43402
Telephone- (419) 278-2483

DATED: May 31, 1988.

PROOF OF SERVICE: A copy of the foregoing Notice of Appeal to the United States Supreme Court was sent by First Class U.S. Mail to attorney Joseph P. Dawson, 900 Adams Street, P.O. Box 1568, Toledo, OH 43603 this May 31, 1988.

s/s
Walton H. Donnell

FILED
COURT OF APPEALS
MAR 11 1988

LUCAS COUNTY OHIO
Carol A. Pietrykowski, Clerk

COURT OF APPEALS OF OHIO, SIXTH DISTRICT

COUNTY OF LUCAS

C. A. NO. L-87-159

Delton D. Opfer
APPELLEE
CROSS-APPELLANT

-VS-

Lory Arnold, Jr.
APPELLANT
CROSS-APPELLEE

APPEAL FROM

LUCAS COUNTY
COMMON PLEAS
COURT

DECISION AND
JOURNAL ENTRY

DATE: March 11, 1988

This cause is before the court on appeal and cross-appeal from a judgment of the Lucas County Court of Common Pleas.

Defendant-appellant/cross-appellee, Lory Arnold, Jr. (hereinafter referred to as appellant), together with an uninvolved third party, was operating a business known as "Small Engine Repair" since April 1983. Subsequently in April 1984, the

third party left the firm and plaintiff-appellee/cross-appellant, Delton D. Opfer hereinafter referred to as appellee) purchased an interest in the business. Pursuant to an oral partnership agreement, appellee was to receive a fifty percent interest in the business and was to match appellant "dollar for dollar" in income generated by work done by the business. In August 1985, appellee indicated his desire to end the partnership, ultimately giving rise to the instant action.

Trial commenced in March 1987, with the trial court framing the issues as (1) whether the partnership was dissolved in August 1985 by separate agreement between the parties in which appellee allegedly agreed to accept $4,000 for his interest in the business; (2) if the partnership was dissolved, how much is appellee entitled to receive for his fifty percent interest in the business; and (3) if the

partnership was not dissolved by agreement of the parties, should it now be dissolved and the assets distributed by the court.

As noted by the trial court, the parties herein entered into a relatively loose oral agreement, without benefit of counsel, involving relatively large amounts of money and a continuing business relationship. Upon considering all of the evidence that was presented at trial, the trial court found as follows:

> "1. In April of 1984, the parties entered into a partnership agreement in which Plaintiff paid Defendant $3,700.00 and received in return a full 50% interest in the business.
>
> "2. Under the agreement, Plaintiff was responsible for matching Defendant dollar for dollar in income produced to the business through work performed for customers.
>
> "3. During the life of the agreement, Plaintiff was obligated to the partnership for any deficiency in the dollar for dollar contribution that resulted due to his inability to work.
>
> "4. Under the agreement, Plaintiff was to pay an additional amount to

obtain a 50% interest in the tools. Plaintiff did not make this payment; the tools remained the property of the Defendant and never became partnership property.

"5. The partnership was dissolved by agreement of the parties in August of 1985.

"6. In their agreement to dissolve the partnership, the parties did not come to a meeting to the minds as to the amount that Plaintiff would received [sic] for his 50% interest in the partnership.

"7. Since there is no accounting available for the specific period of the partnership, this court values Plaintiff's interest in the partnership as follows:

"a. Income attributable to Plaintiff that was returned to the business in the amount of

1984----$3819.15

1985---- 3883.71

"b. 50% of the additional payment made to Defendant in 1985 ($3400)

---- 1700.00

"c. 50% of the value of the business as set at the time the agreement was entered into

---- 3700.00

"8. Plaintiff is entitled to receive 50% of the amount paid to the business in 1986 for the separate welding job done by him, ($1400)

700.00;

"9. Plaintiff is responsible to Defendant for a deficiency in th dollar for dollar match portion of the agreement in th amount of 4,179.90;

"10. Plaintiff is entitled to receive from Defendant his 50% interest in the business in the amount of $9,622.96."

From said judgment appellant filed a timely notice of appeal with appellee filing a subsequent cross-appeal. Each party's assignments of error will be discussed in turn. Initially, we look to appellant's assignments of error which state as follows:

"1. The judgment is not sustained by the evidence and is against the manifest weight of the evidence.

"2. A state official, the trial judge, had a personal bias or prejudice for plaintiff to the extent that it prevented him from exercising his judicial functions impartially in defendant's case, in direct violation of defendant's Fourteenth Amendment Due Process right."

Appellant alleges in the first assignment of error that the decision of

the trial court was against the manifest weight of the evidence. As stated by the Ohio Supreme Court in C.E. Morris v. Foley Construction Co. (1978), 54 Ohio St. 2d 279, 280:

> "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

It is well settled that the conclusions of the trier of fact enjoy a presumption of validity in determining whether the judgment below is manifestly against the weight of the evidence. Hines v. Amole (1982), 4 Ohio App. 3d 263 266. The rationale for such a presumption was succinctly stated in Seasons Coal Co. v. Cleveland (1984), 10 Ohio St. 3d 77, 80, whereby the Ohio Supreme Court stated:

> "The underlying rationale of giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflec-

> tions, and use these observations in weighing the credibility of the proffered testimony."

With these standards established, we now turn to appellant's argument. Initially, appellant contends that there was no evidence to support the trial court's finding of fact number 6 which states that there was no "meeting of the minds" as to the amount appellee would receive for his fifty percent interest in the partnership. Appellant contends that the $4,000 buy-out offer he made to appellee was accepted by appellee. Appellee testified that he did not accept appellant's offer. Both sides produced an additional witness to support their positions. Ultimately, the decision as to whose testimony was more credible rested with the trial court. As noted above, the trial court was in the best position to view witnesses and observe their demeanor. Based on such observations and in light

of the lack of any written documentation, the trial court acted well within the scope of its authority in finding that the parties did not come to a mutual understanding as to the valuation of appellee's fifty percent interest in the partnership.

Appellant also contends that it was against the manifest weight of the evidence for the trial court to fail to credit appellant for an additional $1,100 he allegedly invested in the partnership and in the court's refusal to award him an amount for tool rental. As to appellant's alleged $1,100 credit, appellant's self-serving statement was not corroborated by any additional evidence nor was there any record of such investment ever being made. Further, as to the tools, appellee testified that he believed the funds used to initially buy into the partnership included use of all tools

(the tools were not partnership property). Appellant, however, testified as to his understanding that appellee was to pay appellant an amount for rent for use of appellant's tools. As noted supra, these matters involve issues of credibility and deference must be given the findings of the trial court. The trial court after reviewing all of the evidence, including the testimony of the witnesses, chose not to include these claims in the final award. Because there was competent, credible evidence, it cannot be said that the judgment of the trial court as to these issues was against the manifest weight of the evidence. Accordingly, appellant's first assignment of error is without merit and found not well-taken.

In the second assignment of error, appellant contends that the trial judge had a personal bias or prejudice in favor of appellee. Appellant asserts that dur-

ing trial, the judge became too involved in the proceedings thereby taking on an adversarial role in violation of appellant's Fourteenth Amendment Due Process rights. We disagree.

We note, upon review of the transcript of proceedings, that the trial judge did intervene during the questioning of certain witnesses. The purpose of such intervention, however, was to clarify unclear and complex questions posed to the witnesses by counsel. This is neither prejudicial nor biased behavior, rather, competent and responsible action on the part of the trial judge. Accordingly, appellant's second assignment of error is without merit and found not well-taken.

Turning to the cross-appeal, appellee sets out the following assignments of error:

"I. THE TRIAL COURT ERRED IN FAIL-

ING TO APPLY SECTIONS OF OHIO'S UNIFORM PARTNERSHIP LAW IN COMPUTING THE VALUE OF THE PLAINTIFF'S SHARE IN THE DISSOLVED PARTNERSHIP AND BY IGNORING GENERAL EQUITABLE PRINCIPLES IN FASHIONING ITS AWARD.

"II. THE TRIAL COURT ERRED IN COMPUTING ITS AWARD BY NOT INCLUDING INTEREST PURSUANT TO O.R.C. SECTION 1775.41.

"III. THE TRIAL COURT ERRED IN ASSESSING THE PLAINTIFF $4,179.90 FOR TIME NOT MATCHED 'DOLLAR FOR DOLLAR' WITH THE DEFENDANT, AS THERE WAS NO CREDIBLE EVIDENCE SUVMITTED TO THAT EFFECT AND THE PLAINTIFF WAS PREVENTED BY THE DEFENDANT FROM SO MATCHING."

In the first assignment of error, appellee contends that the trial court erred in failing to apply sections of Ohio's Uniform Partnership law in computing the value of appellee's share in the partnership. The trial court found that the partnership between the parties was dissolved in August 1985. With no accounting available, the trial court, as noted above, valued appellee's interest in the partnership as follows:

a. Income attributed to appellee that was returned to the business (ordinary income)

1984	$3,819.15
1985	3,883.71

b. 50% of the amount withdrawn by appellant in 1985 ($3,400)

1,700.00

c. 50% of the value of the business at the time appellee entered the partnership (appellee's initial contribution)

3,700.00

d. 50% of the amount received by the partnership for a separate welding job done by appellee in 1986 ($1,400)

700.00

e. Appellee's deficiency in the "dollar for dollar" match portion of the agreement

(4,179.90)

Thus, the trial court found appellee was entitled to receive from appellant $9,622.96 representing his fifty percent share in the partnership after including all necessary additions and deductions.

The provisions of the Ohio Uniform Partnership Act codify and clarify the complex legal relationship that arises

between individuals when partnerships are formed. Partnerships are unique entities in that the involved parties are relatively free to define for themselves the parameters of their relationship. It is not necessary that an agreement of partnership be in any particular form. The cornerstone of a partnership is that the parties, by mutual consent, have the ability to structure their relationship anyway they desire. As with any relationship, however, problems may arise requiring a court to intervene.

The agreement between the parties in the case sub judice was loosely structured with nothing reduced to writing. The trial court correctly observed that:

> "While it is certainly obvious that the legal effect of what was or was not included in the agreement was not given much consideration at the time it was entered into, both parties are now asking this court to analyze this agreement in strict legal terms and pronounce its strict legal effect.*** The fruits of that

> exercise are minimal, however, since, as is always the case in such transactions, it is obvious that what was said by one of the parties was not necessarily what was heard by the other."

Because the agreement between the parties is incomplete, we must turn to the provisions of the Ohio Uniform Partnership Act for assistance in establishing the rights of the parties upon dissolution of their partnership. R.C. 1775.39 states in pertinent part as follows:

> "1775.39 Rules for settling accounts between partners after dissolution
>
> "In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:
>
> "(A) The assets of the partnership are:
> (1) The partnership property;
> (2) The contributions of the partners necessary for the payment of all the liabilities specified in division (B) of this section.
>
> "(B) The liabilities of the partnership shall rank in order of payment, as follows:
> (1) Those owing to creditors other than partners;

(2) Those owing to partners other than for capital and profits;
(3) Those owing to partners in respect to capital;
(4) Those owing to partners in respect of profits.

"(C) The assets shall be applied in the order of their declaration in division (A) of this section to the satisfaction of the liabilities."

In reviewing the evidence before the trial court the assets of the partnership upon dissolution totaled $39,336.41. Using this figure as a starting point, we now apply the provisions of R.C. 1775.39 (B) in computing appellee's interest.

1775.39(A)	Assets of the Partnership	$39,336.41
1775.39(B)(1)	Those owing to creditors other than partners	9,691.72
1775.39(B)(2)	Those owing to partners other than for capital and profits	0.00

At this point, after deducting the monies owed to creditors other than partners and

amounts owed partners other than for capital and profits, $29,644.69 remains in the partnership capital account. Appellee asserts that his share of the partnership should be based on fifty percent of this amount or $14,822.34. We do not agree. R.C. 1775.39 specifically separtes capital and profits in its distribution scheme and in so doing allows each partner to regain the amount individually invested by way of capital contribution. This is consistent with R.C. 1775.17 which states:

> "1775.17 Rules for determining rights and duties of partners
>
> "The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:
>
> "(A) Each partner shall be repaid his contribution, whether by way of capital or advances, to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied;***" (Emphasis added.)

Therefore, we will determine appellee's

individual captial return and then add to this figure the agreed fifty percent of the profits. In reviewing the evidence before the court, appellee's capital contribution at the point of dissolution consisted of $8,921.78, his capital account at the beginning of the year and $233.31 additional capital contributed during the year. Hence, appellee's capital contribution totaled $9,155.09. We add to this figure $3,883.71 which represents appellee's net earnings for the year (his fifty percent share of the profits for the year). In sum, appellee's share of capital and profits totaled $13,038.80.

Having computed appellee's individual interest in the partnership, we now include the additional factors as found by the trial court:

a.	Appellee's share in the partnership	$13,038.80

b. 50% of additional payment made to appellant in 1895 ($3,400)	1,700.00
c. Separate welding job ($1,400)	700.00
	$15,438.80
Deduction for deficiency in dollar for dollar match portion of the agreement	- 4,179.90
Appellee's total partnership share	$11,258.90

Additionally, R.C. 1775.41 concerning the rights of a retiring or deceased partner states as follows:

> "When any partner retires or dies, and the business is continued *** without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right and the property of a dissolved partnership.***"

Accordingly, appellee is entitled to the interest that has accrued since the date of dissolution on his $11,258.90 share of the partnership. R.C. 1343.03 states that upon a judgment or settlement between parties arising out of a contract or other transaction "the creditor is entitled to interest at the rate of ten percent per annum ***." Appellee, therefore, is entitled to the interest, at ten percent per annum, that has accrued on his $11,258.90 share of the partnership assets as of the date of dissolution. Accordingly, appellee's first assignment of error is found well-taken in part.

Arguing in the alternative, appellee's second assignment of error states that the trial court erred in not granting appellee's interest on the trial court judgment award. In light of our disposition of the first assignment of error, appellee's second assignment of error is

found moot and not well taken.

In the third assignment of error, appellee states that the trial court erred in assessing appellee $4,179.90 for time not matched "dollar for dollar" with appellant. As was noted supra in appellants first assignment of error, in viewing the issue of credibility of witnesses, deference must be given the findings of the trial court. See Seasons Coal Co. v. Cleveland, supra. The trial court acted within its boundaries in finding appellant's testimony credible and awarding monies based on a deficiency in the "dollar for dollar" match portion of the parties agreement. Accordingly, appellee's third and final assignment of error is without merit and found not well-taken.

On consideration whereof, this court finds that substantial justice has been done the appellant in the case sub judice, while substantial justice has not been

done the appellee and the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. Pursuant to App. R. 12(B), this court enters the judgment that the trial court should have entered, that the appellee is entitled to receive from appellant the amount of $11,258.90 representing his share of the partnership, plus ten percent interest per annum as of the date of dissolution. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

Alice Robie Resnick ,P.J., _____
PRESIDUBG JUDGE

Peter M. Handwork, J., and _____
JUDGE

George M. Glasser, J. _____
CONCUR. JUDGE

FILED
LUCAS COUNTY
APR 30 9 48 AM '87
COMMON PLEAS COURT
CAROL A PIETRYKOWSKI
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF
LUCAS COUNTY, OHIO

Delton D. Opfer, Plaintiff,	*	Case No. 86-1918
vs.	*	DECISION AND JUDGMENT ENTRY
Lory Arnold, Jr., Defendant.	*	Judge Charles D. Abood

On March 30, 1987, this case was called for trial to the court on Plaintiff's complaint and Defendant's counterclaim. Trial was had and each party was granted leave to file a post-trial memorandum.

The facts of the case that are not in dispute are:

The Defendant, Lory Arnold, Jr., together with a third party had been operating a business known as Small Engine Repair

since April of 1983. In April of 1984, the third party left the business and Plaintiff, Delton D. Opfer, purchased an interest in the business for $3700.00. This amount was paid by Plaintiff to Defendant in cash pursuant to an oral partnership agreement in which Plaintiff was to get a 50% interest in the business and was to match Defendant dollar for dollar in income generated by work done for the business.

Several matters as to the business relationship between the parties remain at issue:

First, was the partnership dissolved by a separate agreement between the parties in August of 1985 in which Plaintiff agreed to accept $4,000.00 for his interest in the business?

Second, if the partnership was dissolved by agreement of the parties in August of 1985, but no agreement was

reached as to the amount Plaintiff was to receive for his 50% interest in the business, how much is Plaintiff entitled to receive for his interest in the business?

Third, if the partnership was not dissolved by agreement of the parties, should it now be dissolved and the assets distributed by this court?

As always in this type of case, the answers to these questions are not easily arrived at. The parties herein entered into a relatively loose agreement, without the help of legal counsel and without reducing it to writing, involving relatively large amounts of money and a continuing business relationship. While it is certainly obvious that the legal effect of what was or was not included in the agreement was not given much consideration at the time it was entered into, both parties are now asking this court to analyze this agreement in strict legal terms and pro-

nounce its strict legal effect. That is no easy task. To begin with, since nothing is in writing, this court must look to the words and actions of the parties in an effort to decipher the terms on which their minds did meet both in entering into and in dissolving (if in fact it has been dissolved) the partnership. The fruits of that exercise are minimal, however, since, as is always the case in such transactions, it is obvious that what was said by one of the parties was not necessarily what was heard by the other.

In the face of these difficulties, when considering all of the evidence that was presented at trial, the written arguments of counsel and the law that applies to this case, this court finds:

1. In April of 1984, the parties entered into a partnership agreement in which Plaintiff paid Defendant $3,700.00 and received in return a full 50% inter-

est in the business.

2. Under the agreement, Plaintiff was responsible for matching Defendant dollar for dollar in income produced to the business through work performed for customers.

3. During the life of the agreement, Plaintiff was obligated to the partnership for any deficiency in the dollar for dollar contribution that resulted due to his inability to do the work.

4. Under the agreement, Plaintiff was to pay an additional amount to obtain a 50% interest in the tools. Plaintiff did not make this payment; the tools remained the property of the Defendant and never became partnership property.

5. The partnership was dissolved by agreement of the parties in August of 1985.

6. In their agreement to dissolve

the partnership, the parties did not come to a meeting of the minds as to the amount that Plaintiff would received (sic) for his 50% interest in the partnership.

7. Since there is no accounting available for the specific period of the partnership, this court values Plaintiff's interest in the partnership as follows:

a. Income attributable to Plaintiff that was returned to the business in the amount of

1984----$3819.15

1985---- 3883.71

b. 50% of the additional payment made to Defendant in 1985 ($3400)

---- 1700.00

c. 50% of the value of the business as set at the time the agreement was entered into

---- 3700.00

8. Plaintiff is entitled to receive 50% of the amount paid to the business in 1986 for the separate welding job done by him, ($1400) 700.00;

9. Plaintiff is responsible to Defendant for a deficiency in the dollar for dollar match portion of the agreement in the amount of 4,179.90;

10. Plaintiff is entitled to receive from Defendant his 50% interest in the business in the amount of $9,622.96.

JUDGMENT ENTRY

It is hereby ordered that Plaintiff is granted judgment against Defendant in the amount of $9,622.96 plus court costs.

It is further ordered that judgment is hereby rendered for the Plaintiff on Defendant's counterclaim.

s/s
Charles D. Abood, Judge

The Supreme Court of Ohio

Columbus

1988 TERM

To wit: May 25, 1988

Delton D. Opfer,
Appellee,

v.

Lory Arnold, Jr.,

Appellant.

Case No. 88-668

E N T R Y

Upon consideration of the motion for an order directing the Court of Appeals for Lucas County to certify its record, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by Walton H. Donnell.

s/s
THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court,

to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 25th day of May, 1988.

MARCIA J. MENGEL CLERK

s/s DEPUTY

FILED
COURT OF APPEALS
MAY 31 1988
LUCAS COUNTY, OHIO
Carol A. Pietrykowski,Clerk

IN THE COURT OF APPEALS OF
LUCAS COUNTY, OHIO

Delton D. Opfer,	:	CASE NO.- L-87-159
Plaintiff-Appellee,	:	
-vs-	:	TRIAL COURT NO.- 86-1918
Lory Arnold, Jr.,	:	NOTICE OF APPEAL TO
Defendant-Appellants.	:	THE SUPREME COURT OF THE UNITED STATES

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Lory Arnold, Jr., defendant-appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of Lucas County, Sixth Appellate District, dated March 11, 1988, which judgment was denied review by the Supreme Court of Ohio in an Entry dated May 31, 1988, dismissing

defendant-appellant's appeal to the state's highest court.

The record is in this Court of Appeals whose judgment of March 11, 1988, afffirmed the judgment of the trial court, the Common Pleas Court of Lucas County, Ohio, dated April 30, 1987.

Defendant's appeal taken pursuant to Title 28 USC §1257(3).

s/s
Walton H. Donnell
ATTORNEY FOR DEFENDNAT-APPELLANT
742 Otsego Pike, P.O. BOx 733
Bowling Green, OH 43402
Telephone: (419) 278-2483

PROOF OF SERVICE: A copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by First Class Mail to attorney Timothy Connors, Suite 800 First Federal Plaza, Toledo, OH 43624-1671.

s/s
Walton H. Donnell